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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 YASMIN MOHAMED, personally
known as Yasminah,

5 Plaintiff,

6 v.

18 Civ. 8469 (JSR)

7 REPUBLIC RECORDS, et al.,

8 Defendants.

Oral Argument

9 -----x
10 New York, N.Y.
December 19, 2018
3:40 p.m.

11 Before:

12 HON. JED S. RAKOFF,

13 District Judge

14 APPEARANCES

15 DONIGER/BURROUGHS LAW FIRM
16 Attorneys for Plaintiff
17 BY: SCOTT ALAN BURROUGHS, ESQ.

18 DAVIS WRIGHT TREMAINE LLP
19 Attorneys for Defendants
20 BY: PETER J. ANDERSON, ESQ.
21 AMANDA B. LEVINE, ESQ.

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1 (Case called)

2 THE DEPUTY CLERK: Will everyone please be seated and
3 will the parties please identify themselves for the record.

4 MR. BURROUGHS: Good afternoon, your Honor. Scott
5 Burroughs from Doniger/Burroughs for the plaintiff.

6 THE COURT: Good afternoon.

7 MR. ANDERSON: Good afternoon, your Honor. Peter
8 Anderson, and with me is Amanda Levine of Davis Wright Tremaine
9 for the defendants Abel Tesfaye; Jason Quenneville; The Weeknd;
10 XO, LLC; and UMG Recording, Inc.

11 THE COURT: Good afternoon.

12 All right. We're here on the motion to dismiss or, in
13 the alternative, the motion to transfer.

14 So let's start with the motion to dismiss. Let me
15 hear from moving counsel.

16 MR. ANDERSON: Your Honor, I apologize. Argue from
17 here or --

18 THE COURT: I think it's a little bit better in terms
19 of picking up your voice if you stand over there where the
20 microphone is right there. Yes.

21 MR. ANDERSON: Thank you, your Honor.

22 On the motion to dismiss, of course we have to look at
23 each defendant, and looking first at Jason Quenneville, he
24 clearly is not subject to jurisdiction here.

25 Mr. Quenneville -- and the evidence is undisputed that he is a

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1 resident of California. He's had very infrequent visits to New
2 York. He has no --

3 THE COURT: He has my condolences, of course.

4 MR. ANDERSON: He did testify that he visits a friend,
5 you know, from time to time here. He has no contractual
6 relationship directly with UMG Recordings, Inc. His
7 contractual relationship that relates to "Starboy" is with Abel
8 Tesfaye in California. And he is the composer of the song.
9 That's basically it. So the plaintiff hasn't identified any
10 contact between Mr. Quenneville and New York that would give
11 rise to personal jurisdiction.

12 THE COURT: Well, do I have it right that Tesfaye --
13 I'm probably mispronouncing the name -- and Quenneville created
14 the song "Starboy" in California but it was mastered in New
15 York?

16 MR. ANDERSON: Actually, it's a twist away from that,
17 your Honor. Several years before, or a year before "Starboy"
18 was created, Mr. Quenneville and Mr. Tesfaye worked on a
19 different song, "Ebony." "Ebony" has a few lyrics and a chord
20 progression that was then used in France when the "Starboy"
21 recording was -- the first rough demo of that was created by
22 Mr. Tesfaye and Daft Punk. So Mr. Quenneville's only
23 relationship to "Starboy" in the creation of it is what he did
24 in California with respect to "Ebony," not even "Starboy."

25 And the mastering issue is really, frankly, I believe,

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1 a side issue, and a distraction. The mastering did not
2 complete the recording. The testimony from Mr. Tesfaye at his
3 deposition, he said in several instances, the recording was
4 completed in Los Angeles.

5 So if I can just sort of summarize the process, you
6 first had, I believe in 2015, maybe 2014, you had
7 Mr. Quenneville working with Mr. Tesfaye in Los Angeles to
8 create "Ebony." You then, in 2016, have Mr. Tesfaye in France
9 with Daft Punk. Daft Punk creates some music there.

10 Mr. Tesfaye adds some lyrics and apparently some chords that --

11 THE COURT: Now I take it I have unanimous agreement
12 of the parties and the Court to transfer this case to Paris,
13 France, and as you well know, the Southern District extends
14 that far, but -- go ahead.

15 MR. ANDERSON: When your Honor ordered the
16 jurisdictional discovery, including the depositions of each of
17 the defendants, my client, Mr. Tesfaye, was actually on a
18 concert tour. If we had arranged it just four days earlier, I
19 would have been in France. Unfortunately I was in Hong Kong,
20 which isn't a bad place, actually, but I did miss out on a
21 visit to France.

22 So, continuing. So you have a rough demo created in
23 France that is then re-recorded in Los Angeles with the other
24 people involved that haven't yet been served, on Mr. Henry and
25 the other gentleman from Canada, and at that point, in the

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1 Conway Studios in Hollywood, California, that composition is
2 completed.

3 The evidence, including the testimony of Mr. Tesfaye
4 at his deposition, and in his declaration, is that the
5 recording was completed in Los Angeles. Mastering is simply a
6 process that UMG Recordings arranged for, not Mr. Tesfaye, to
7 make the recording, to equalize the sound volume so that it
8 could be provided to a replicator and manufacturer, outside of
9 New York, by the way. And so Mr. Tesfaye and Mr. Quenneville
10 had nothing to do with the mastering. The mastering did not
11 complete the recording. It was completed in California. But
12 there are technical things that had to be done before UMG could
13 deliver it to the people who actually have the factories that
14 make the CDs and do the magic that they do.

15 THE COURT: Go ahead.

16 MR. ANDERSON: Okay. Thank you.

17 So clearly there's no jurisdiction over
18 Mr. Quenneville.

19 Mr. Tesfaye is only a twist away, but there's still no
20 jurisdiction as to him. Mr. Tesfaye -- first of all, there's
21 no general jurisdiction. He resides in California. The
22 plaintiff has pointed to the fact that after the case was
23 filed, he leased an apartment in Tribeca for a year because his
24 girlfriend lives here, and so it was as a birthday gift. And
25 nowadays, when he happens to be in New York, he'll stay at the

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1 condo, as long as the lease lasts, rather than a hotel. That
2 is far and away from the kind of activity that has to happen to
3 change his domicile from Los Angeles to New York. He hasn't
4 given up his house in Los Angeles. Plaintiff adduced testimony
5 at Mr. Tesfaye's deposition that he has what they call a
6 \$20 million mansion. I don't believe there's actually any
7 evidence of the price. But he owns a home in Los Angeles. His
8 testimony is that in 2012, prior to 2016, I believe, he was a
9 resident in Canada, and in 2016 he moved to Los Angeles, where
10 he rented an apartment on Wilshire Boulevard, and then in 2017,
11 early 2017, I believe, he bought a house in Hidden Hills, which
12 is in Los Angeles County, and he lives there today. He has
13 spent -- in October, he spent several weeks, maybe even a
14 little bit more, in his newly leased apartment in Tribeca with
15 his girlfriend, and then he went on tour. That is not general
16 jurisdiction as a matter of law.

17 On specific jurisdiction, he, back in 2012, entered
18 into an agreement with a Canadian company for the distribution
19 of -- actually his company entered into an agreement with a
20 Canadian company for the distribution of his recordings, or
21 recordings featuring him in Canada. He also entered into an
22 agreement with UMG Recordings, which is a Delaware corporation
23 with a principal place of business in California. It has a
24 division, an unincorporated division that has offices in New
25 York and Santa Monica. And under that agreement, between what

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1 was then CP Records but now my client, The Weeknd/XO, LLC has
2 succeeded to that agreement -- under that agreement, The
3 Weeknd/XO, LLC authorizes UMG Recordings to basically arrange
4 for the distribution of recordings that feature the artist.
5 Plaintiff relies heavily on the fact that that agreement has a
6 New York forum clause. However, we know from *Bristol-Myers*
7 *Squibb* that the mere fact that you enter into a contract with a
8 party that's in the forum for the distribution of a product is
9 not enough. That's what the California Supreme Court thought
10 it was, and in *Bristol-Myers*, the Supreme Court reversed it and
11 said, just because the defendant had entered into a contract
12 with a California company for the distribution of -- I believe
13 it was a medication, in California, that that was not enough
14 under the specific jurisdiction analysis.

15 So the only thing they've really got on Mr. Tesfaye is
16 that he owns the company that contracted with UMG Recordings.
17 Now under those kinds of agreements, where a company is
18 agreeing to deliver a recording, no one wants to get a pig in
19 the poke and so you also ask the recording artist to say, yes,
20 I will in fact record. And Mr. Tesfaye did. You know, back in
21 2012 he signed an agreement -- an inducement letter, they're
22 called -- where he said, yes, in order to confirm that I will
23 in fact, you know, record and deliver my recordings to The
24 Weeknd/XO, what became The Weeknd/XO, LLC, and, you know, so
25 that it can fulfill its contractual relationship.

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1 But once again, you know, it's even a step away from
2 *Bristol-Myers Squibb*, because he didn't directly contract, he
3 just provided an inducement letter, but again, the recording
4 itself was done in California.

5 The other thing they point to is that he performs
6 concerts in New York. And the evidence is undisputed that he
7 performed over 110 concerts throughout the US and
8 internationally, and of those, I think there were four that
9 were in New York. So what we have is something very similar to
10 the case in the Eastern District of Missouri that we've cited
11 involving Katy Perry where, you know, if the courts were to say
12 that every place that a recording artist performs a song, that
13 is an alleged infringement, you can sue anywhere; you can sue
14 in Wyoming or anywhere you want to sue them. And that clearly
15 is inconsistent with what the Supreme Court has said in the
16 cases that we've cited from 2017 and 2014. You have to show a
17 special relationship that the defendant has with the forum and
18 that the claim arises from that. There is no special
19 relationship here. Mr. Tesfaye recorded a song in France and
20 then completed it in California, and it's been distributed
21 throughout the world. New York happens to be in the world, and
22 so of course there are concerts and there are performances and,
23 you know, you can buy a CD in New York.

24 THE COURT: Whether New York is in the world is, of
25 course, a matter subject to genuine dispute.

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1 But anyway, I think I have the gist of your argument.
2 Let's hear now from your adversary. We'll come back to you in
3 a bit.

4 MR. ANDERSON: Okay. Thank you, your Honor.

5 MR. BURROUGHS: Thank you, your Honor.

6 First, as to the long-arm statute that we're talking
7 about, we're talking about CPLR 302. To the extent there's an
8 argument about Missouri and what the federal court in that
9 state would have done, it's irrelevant.

10 Under CPLR 302(a)(1), entering into a contract for the
11 distribution of a product that's infringing is sufficient to
12 confer jurisdiction. Here, it's undisputed that
13 Mr. Quenneville entered into an agreement with Weeknd/XO,
14 Tesfaye's label, and Tesfaye enters into an agreement with UMG.
15 Both of those agreements, which included New York forum
16 clauses, were for the distribution and marketing of the
17 "Starboy" product, the product at issue in this case, in New
18 York and elsewhere. And the evidence as it stands now is that
19 the only place that "Starboy" was sold or streamed is New York.
20 The evidence in the record establishes that UMG, per their
21 agreement with Tesfaye and protected agreement with
22 Quenneville, sold over 125,000 units of the infringing song in
23 New York, and streamed the infringing song over 33 million
24 times in New York.

25 I note that in the reply papers, there's no

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1 counterfactual. There's no evidence of sales or streams of
2 "Starboy" anywhere but New York. In the moving papers, on
3 page 6, there is a statement that the song was distributed and
4 performed worldwide, but there's no evidence of that. That
5 statement doesn't cite to anything in the record. As the
6 record stands now, the only evidence is that the
7 Tesfaye-Quenneville song was distributed and performed in New
8 York. And the fact that it was distributed by UMG in New York
9 is of no moment. The agreements that were entered into by both
10 Tesfaye and Quenneville specifically contemplated that song to
11 be marketed and sold in New York. And it was.

12 And on the issue of Tesfaye's declaration, which
13 Mr. Anderson relied on quite a bit in his papers and in oral
14 argument, Mr. Tesfaye disavowed that declaration during his
15 deposition. He said, "I did not read it before signing it."
16 And that was shocking, when I reviewed the transcript, to me,
17 so I went back and looked at his declaration to see what was on
18 it -- I wanted to give him the benefit of the doubt -- see what
19 was on the page that he did sign. Maybe he only read those
20 paragraphs. And I realized when I did that that the Tesfaye
21 declaration, his signature is by itself on its own page. Even
22 the jurat, his under oath statement, is on the preceding page.
23 And the spacing for that is peculiar. If your Honor looks at
24 it -- it's at Document 61 --

25 THE COURT: Hang on.

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1 MR. BURROUGHS: -- you'll see --

2 THE COURT: Hang on just a second.

3 Document? Give me the number again?

4 MR. BURROUGHS: Document 61, your Honor. And it's
5 page 5 of 5.

6 THE COURT: Yes. So you're talking about, in the
7 declaration of Scott Burroughs, attaching various exhibits?

8 MR. BURROUGHS: No, your Honor. I'm looking at
9 Document No. 61 filed 11/19, declaration of Abel Makkonen
10 Tesfaye.

11 THE COURT: All right. Oh, by 61, you mean the docket
12 number?

13 MR. BURROUGHS: Yes, Document 61 as stamped by ECF.

14 THE COURT: I see. I thought you meant Exhibit 61.

15 Okay. Now I'm with you.

16 All right. So I'm looking at the Declaration of
17 Defendant Abel Makkonen Tesfaye in Support of the Motion to
18 Dismiss or Transfer, and what is it you say is wrong with this?

19 MR. BURROUGHS: So, your Honor, during his deposition
20 Mr. Tesfaye was presented with the declaration and testified
21 under oath, "I did not read this before signing it."

22 THE COURT: Right. That would only be true normally,
23 in a case like this, in 99.9 percent of the declarations that
24 are submitted, because what normally happens is the lawyer
25 meets with the client, gets the facts, puts them into a

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1 declaration, the client is told, read it over and then sign it
2 if you agree, but in this cold, cruel world, the clients just
3 go ahead and sign. So what's the matter?

4 MR. BURROUGHS: Well, it matters in this case, your
5 Honor, because at his deposition he also disavowed multiple
6 statements in the declaration.

7 THE COURT: Ah. That's more relevant. Okay.

8 MR. BURROUGHS: But when he was asked, well, did you
9 even read it, because it appears that everything in this
10 declaration you're now telling us is untrue, and that led us to
11 review the signature page, which is, of course, by itself, and
12 then the strange spacing on the one preceding it, which looks
13 to be, as your Honor indicated, they had him sign something and
14 then they appended it to this declaration.

15 THE COURT: Well, I don't find the spacing so
16 suspicious. But maybe we should interrupt at this point and
17 ask defense counsel: Who drafted this?

18 MR. ANDERSON: Your Honor, I did. It went through
19 different versions. Mr. Tesfaye was out of the country on the
20 tour that I mentioned before, and the final version was sent to
21 him. Again, it was a revised version. And I got back that
22 scanned signature which I think probably -- I don't know how
23 they did it, but they did it someplace outside the US and sent
24 it back.

25 THE COURT: So let me ask plaintiff's counsel: So

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1 what was it that he disavowed at his deposition that's in this
2 declaration?

3 MR. BURROUGHS: At least two things, your Honor, the
4 first of which is paragraph 13, where he indicates that the
5 song was created in Los Angeles. During deposition, he
6 testified that he traveled to Paris, France, and met with the
7 two individuals that comprised Daft Punk and recorded the song.
8 In publicly available interviews, he also testified that he
9 traveled to France and met with the individuals in Daft Punk to
10 create this song. So in paragraph 13, he testified, it's not
11 accurate.

12 In addition --

13 THE COURT: Well, hold on a minute. Just a minute.
14 Paragraph 13 says, "The 'Starboy' composition and sound
15 recording were created in 2016 by combining in Los Angeles
16 County, California. Recording was provided by Guillaume
17 Emmanuel de Homem-Christo and Thomas Bangalter, who are known
18 professionally as Daft Punk, with music and lyrics that Martin
19 McKinney, Henry Walker, Jason Quenneville, and I created."

20 So he doesn't say there that his part of the creation
21 was in Los Angeles.

22 MR. BURROUGHS: Your Honor, that's where I was getting
23 to. That has to be read in conjunction with paragraph 17,
24 where he says, and I quote, "My contributions to 'Starboy' also
25 were created in Los Angeles County, California."

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1 THE COURT: Ah. So yes, 17 reads, "The contributions
2 of Mr. McKinney, Mr. Walter, and Mr. Quenneville to *Starboy*
3 were created in my presence at Conway Recording Studios in
4 Hollywood, California, and my contributions to *Starboy* were
5 also created in Los Angeles County, California, including at
6 Conway Recording Studios. At Conway Recording Studios, these
7 various contributions to the creation of *Starboy* were combined
8 to create the musical composition and sound recording of
9 *Starboy*."

10 So let me go back to defense counsel. What about
11 that?

12 MR. ANDERSON: I think, frankly, it's just, with all
13 respect, quibbling about the language. I mean, first of all,
14 as your Honor pointed out, paragraph 13 just says that it was
15 combined in 2016 from recordings from France and from
16 California. The reference in 17 is more along the lines that
17 the contributions of Mr. McKinney, Mr. Walter, and
18 Mr. Quenneville were in the presence of Mr. Tesfaye when he
19 made additional contributions in 17. And at his deposition, he
20 testified that it was completely re-recorded. In other
21 words --

22 THE COURT: Let me go back to plaintiff's counsel.
23 Wasn't the deposition testimony that while a demo may have been
24 recorded in Paris, the whole thing was re-recorded in Los
25 Angeles and the album was finished there?

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1 MR. BURROUGHS: Well, the album then was again
2 re-recorded and rebalanced in New York, so it did take place in
3 multiple locations, but his testimony, both at deposition and
4 in the interview, the video of which we submitted to the Court,
5 Mr. Tesfaye says that he traveled to Paris, France, he met with
6 these two individuals in Daft Punk, and they made the song.
7 There's no discussion whatsoever of anything else. It's true
8 that afterwards there was production done in Los Angeles and in
9 New York, but his statements throughout the entire case, both
10 in deposition and in publicly available interviews, have been
11 that this song was created in Paris, France.

12 THE COURT: So that might help you on the transfer
13 motion, but it cuts against you on the motion to dismiss, does
14 it not?

15 MR. BURROUGHS: It may, but for the fact that this
16 song was a choate project up until the point that it was
17 mastered. As Mr. Anderson conceded, mastering happens before
18 it goes out into the wilderness, before it's marketed to the
19 public. So during all of these phases, this is an inchoate
20 project that's waiting to be mastered. It was mastered in New
21 York. And under CPLR 302(a)(4), the Conway property was used
22 to finish the project that was then marketed by a New York
23 company from New York. And that alone -- and that's another
24 argument actually that's not responded to in the reply papers,
25 but that alone is sufficient to confer jurisdiction.

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1 THE COURT: So your adversary seemed to suggest that
2 the only mastering that occurred was of a fairly ministerial
3 nature.

4 MR. BURROUGHS: We would disagree, your Honor.
5 There's a reason why labels spend a lot of money mastering
6 albums. If you've ever listened to an unmastered album
7 compared to a mastered album, you immediately know the
8 difference. It's making a professional sound recording out of
9 these other -- technically speaking, it's a demo up until it's
10 mastered. It's not complete until it's mastered.

11 THE COURT: I didn't really understand what being
12 mastered was until I got married.

13 MR. BURROUGHS: And before we move on, Judge, just one
14 other statement in paragraph 17. And this goes to both
15 Mr. Quenneville and Mr. Tesfaye. Again, Mr. Tesfaye is
16 declaring under penalty of perjury that the contributions of
17 Mr. Quenneville to "Starboy" were performed in his presence in
18 California. Mr. Quenneville in deposition said that that's
19 absolutely not true; he was not in the room. So that's another
20 falsehood that's in his declaration. So while it's
21 understandable that in the busy modern lives of lawyers and
22 artists that a declarant may not read a declaration before he
23 signs it --

24 THE COURT: No. It's quite something else if it's not
25 accurate. I mean, that is the more serious problem.

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1 MR. BURROUGHS: Right.

2 And to respond to Mr. Anderson's points, where he
3 indicated it was simply quibbling over language, that's
4 absolutely false. The locus of the creation of the song at
5 issue is, you know, paramount in importance amongst all the
6 factors that we're talking about today. So if he has in his
7 declaration that he recorded the song in Los Angeles when he
8 didn't, that is a material falsehood, and I think the
9 declaration should be stricken. I don't believe it should be
10 considered. And if that's the case, there's really no evidence
11 on which this Court could grant the motion.

12 But moving to some of the other statements that were
13 made in Mr. Anderson's opening remarks, the litigation history
14 of Universal, UMG, the record label with which Tesfaye and --
15 well, Tesfaye, again, contracted with UMG, Quenneville
16 contracted with Tesfaye through his company. There, all the
17 agreements included New York forum clauses. UMG in the past
18 his required litigation to take place in New York. While they
19 do have an office in California and they do work out of
20 California, Republic, the division of UMG responsible for the
21 work at issue here, has its headquarters in New York. Every
22 document that came from UMG to The Weeknd, from The Weeknd to
23 XO, and even from Tesfaye to our client, where he was trying to
24 settle this case, included New York forum selection clauses.

25 And as we cited, in I believe the *Indian Harbor* case,

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1 forum selection clauses are evidence that will go to the venue
2 question, which we'll discuss shortly, but also to this issue
3 of whether or not there's personal jurisdiction. Tesfaye
4 disclaimed any connection with California in his agreement with
5 UMG. Tesfaye indicated that any dispute between him and UMG,
6 including as to the songs, provided under the agreement, would
7 be subject to only New York courts. And I have had many cases
8 with UMG, and in most cases they challenge jurisdiction in
9 California and try to move the cases here. Just recently we
10 had a similar battle in front of a judge in California, and
11 they said, it's not convenient for us to litigate here in
12 California; we need to litigate these cases in New York,
13 especially when it comes to our division -- in that case it was
14 Def Jam Records. In this case it's Republic Records, but they
15 both share offices right here in Manhattan. Our records are at
16 those offices. Our individuals responsible for the
17 manufacturing, the marketing, the distribution are in New York.

18 And even in this case, in response to the
19 court-ordered discovery, UMG admitted that they marketed and
20 distributed the song at issue, "Starboy," from New York. So to
21 the extent that Tesfaye entered into an agreement with UMG to
22 do that, Tesfaye is subject to jurisdiction here under CPLR
23 302(a)(1). He entered into an agreement through which he knew
24 that the infringing material at issue would be distributed in
25 New York. And then it was. We know over 125,000 units were

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1 sold in New York and over 33 million streams took place in New
2 York. That's the only evidence of anything --

3 THE COURT: All right. I'm going to interrupt you
4 because I want to hear from your adversary, and you were sort
5 of addressing not only the motion to dismiss but also the
6 motion to transfer, and I want to hear your adversary on that
7 as well.

8 MR. ANDERSON: Your Honor, on the first point, the
9 evidence is undisputed that "Starboy" was distributed through
10 the services of UMG Recordings, which contracted with third
11 parties throughout the world, and counsel's suggestion that
12 there's no evidence of the number of streams is actually
13 contrary to his own declaration. He identified as Exhibit 3
14 UMG Recordings' verified supplemental interrogatory response,
15 and that response states that there were sales of phono
16 records, CDs, for example, in New York of 128,000, but it also
17 states that there were over 1.6 million sold throughout the
18 United States. So that's less than 8 percent were sold in New
19 York. They just happened to -- again, they're sold throughout
20 the country.

21 As for the streams, he made a big point about there
22 being over 33 million streams through recipients in New York.
23 That same interrogatory response -- and I would refer the Court
24 to document 65-3, which is page 4 of the exhibit to counsel's
25 declaration -- while there were 33 million streams to residents

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1 in New York, there were 584 million streams to residents of the
2 US. That's less than 6 percent going to New York residents.

3 So there is substantial evidence of a national and
4 international distribution of which it touched New York only
5 because it was an international distribution.

6 Counsel said repeatedly that at his deposition,
7 Mr. Tesfaye repudiated his declaration statements. There are
8 two points to that: (1) even if that were so, which it isn't,
9 they deposed him at length, and the same subject matter is
10 covered in his deposition where he testified, for example, that
11 he lives in Los Angeles, that he has only this attenuated
12 contact and then only a few concerts in New York; but also, if
13 your Honor were to look at Exhibit 8 to my reply declaration
14 where we put in the transcript, the supposed repudiation of his
15 entire declaration, they rely on the testimony at page 14,
16 lines 4-10, where Mr. Tesfaye was asked specifically --

17 THE COURT: I'm sorry. Give me that page again.

18 MR. ANDERSON: Yes, absolutely, your Honor. It's
19 page 14, it's a newspaper-formatted copy of the deposition
20 transcript of Mr. Tesfaye. It's in the lower right-hand
21 corner.

22 THE COURT: Yes.

23 MR. ANDERSON: And --

24 THE COURT: I'm at page 14. Go ahead.

25 MR. ANDERSON: Right.

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1 THE COURT: And on what line?

2 MR. ANDERSON: Well, it actually starts on the square
3 above that, where he's asked about mastering, and he indicates
4 he's unsure where the mastering occurred. Then beginning at
5 line 4, which is page 53 of the transcript, page 14 of the
6 exhibit, it says, "In your declaration, it's your understanding
7 that was mastered -- it was mastered in New York." And he's
8 asked, "Do you know how you came to that understanding?" And
9 at his deposition, he said, "No. To be honest with you, I
10 didn't read the entire declaration."

11 So at most, all that means is he didn't recall at his
12 deposition the basis for the assertion that it was mastered in
13 New York, which is really not an issue because we, on our own,
14 to be candid with everyone, said it was mastered in New York.
15 So it's not a repudiation of his entire declaration. It's just
16 a clarification or a statement that he doesn't recall why he
17 thought it was mastered in New York, but it's irrelevant
18 because the evidence is it was mastered in New York.

19 As to what mastering constitutes, I would refer your
20 Honor to the reply declaration of Wendy Goldstein, which
21 replies to this point that was made in the opposition, and
22 that's Document 71 on the Court's docket, at pages 3-4,
23 paragraphs 9-11. She specifically responds to the argument
24 that somehow this recording was completed not in Los Angeles,
25 as Mr. Tesfaye testified repeatedly in his deposition, but

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1 rather when it was mastered, and she explains that the
2 mastering did not do anything to change any of the music, it
3 just --

4 THE COURT: Sorry. I have the declaration. What
5 paragraph are you reading from?

6 MR. ANDERSON: Pages 3 to 4, beginning at paragraph 9,
7 going through paragraph 11.

8 THE COURT: Okay. So she says, "...mastering does not
9 change, and Sterling Sound's mastering in this instance did not
10 change, the final mix of *Starboy* created in California or any
11 of *Starboy's* music or lyrics."

12 So I'm not quite sure what to make of that. Just
13 taking the last part, someone who directs a movie musical
14 never, or rarely, changes the music or lyrics but they make
15 huge changes in the ultimate product. The director is maybe
16 the single most important person in the entire production. I'm
17 not suggesting that mastering is the equivalent of that, but
18 the fact that the final mix did not change any of the music or
19 lyrics seems to me not so critical, and she doesn't really say
20 what the mastering did. She says, "Once a final mix was
21 prepared and approved in California, Mr. Tesfaye provided it to
22 Republic Records' Santa Monica, California personnel and I
23 arranged for it to be mastered for CD replication at Sterling
24 Sound in New York and mastered for vinyl manufacture at Capitol
25 Studios and mastering in Los Angeles, California. However,

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1 mastering does not change, and Sterling Sound's mastering in
2 this instance did not change, the final mix of *Starboy* created
3 in California or any of *Starboy's* music or lyrics."

4 So that's fine. So what did it do? She doesn't
5 really say, does she?

6 MR. ANDERSON: Well, in the next paragraph, she
7 says -- first of all, she explains that it would have been
8 impossible for them to change the music because they were only
9 provided two tracks, the stereo, right and left. And then she
10 says that the mastering only involved equalizing the sound
11 levels of the recording.

12 THE COURT: Ah. Only involved equalizing the sound
13 levels of the -- okay. I see that now. Okay.

14 MR. ANDERSON: And the other point I would make about
15 that portion that your Honor just read is that UMG arranged for
16 the mastering. UMG is not challenging jurisdiction. And
17 that's not because of Republic Records. It's because when we
18 got into this -- and I take responsibility for this -- what
19 they argued was that Republic Records had done all this stuff
20 in New York, and when I got into that, very early on, it was
21 clear they hadn't. Santa Monica offices of Republic Records
22 was where this was created, where this was overseen, and they
23 were the ones involved. But then, in going further, I learned
24 something else, which is, UMG Recordings has a separate
25 workforce in New York that did some -- not all, but some -- of

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1 the arrangement for the replication and manufacture. A lot of
2 that, including all of the providing it to digital service
3 providers that are based in California, the big ones, you know,
4 took place in California. But because of that, and after, you
5 know, considering it, then we felt that it would have been, you
6 know, not an appropriate use of this Court's time to challenge
7 jurisdiction on behalf of UMG Recordings. So when counsel
8 argues about, well, they've been sued here many times and, you
9 know -- first of all, the docket entries that they produced,
10 most of them are prior to 2014, when the law appeared to be
11 different. Many of them don't even involve UMG Recordings.
12 And third, UMG Recordings isn't challenging specific
13 jurisdiction in this case, so it's irrelevant.

14 THE COURT: With apologies, we have to move this
15 along, because there are counsel here in another matter that
16 follows yours.

17 Let me just ask you one question on the motion to
18 transfer. I don't think I saw from either side much about the
19 nature of the federal docket in California. So say the case
20 remains here. This assumes arguendo there's jurisdiction, the
21 case remains here. We would have it ready for trial by the end
22 of June. Indeed, I had previously planned to have it ready for
23 trial by the end of March. Because this was an important
24 motion, I put everything on hold while this motion practice was
25 occurring. The chances I would move the June 26 ready for

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1 trial date are zero. So that may be irrelevant were I to
2 transfer the case to California. It could be handled promptly
3 there. But if, by contrast, the dockets there are such -- we
4 don't know which judge will get it, but just looking at average
5 dockets -- are such that the case would not be tried for
6 another year and a half, that seems to me a factor. Not the
7 only factor -- it's a multifactor test -- but a factor that
8 cuts in favor of keeping the case here. It will be a more
9 efficient use of the processes of justice.

10 MR. ANDERSON: I have several responses to that.

11 First of all, I believe your Honor's correct. No
12 one's provided any statistical evidence. I have seen it in the
13 past and I can say from other transfer motions, my recollection
14 is the Central District of California disposes of cases, I
15 think it's just under a year on average, maybe a little bit
16 above, but I'd have to check that. I do think your Honor is
17 100 percent right that it depends on the judge. I had one
18 transferred from Pennsylvania to the Central District that was
19 tried I believe nine months after the transfer. So --

20 THE COURT: Well, if I were to transfer this -- no
21 one's asking me to and I'm not proposing this, but if I were to
22 hypothetically transfer it to the Eastern District of Virginia,
23 it would be tried next week.

24 Anyway, I take your point.

25 MR. ANDERSON: Yes. And just specifically with

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1 respect to the transfer motion, two points.

2 Counsel mentioned the Def Jam case. Actually, and
3 that was a transfer case. In the Def Jam case, one recent
4 opinion -- the reason that Universal, or UMG Recordings thought
5 it should be there was because the Def Jam New York offices
6 were responsible for the record project. Here, it's the
7 complete opposite. The Republic Records' Santa Monica offices,
8 the evidence is undisputed, were responsible for this record
9 project.

10 The other thing I just wanted to briefly mention is
11 that what they've done now, they've dropped all their
12 noncopyright claims. They dropped the other California
13 co-authors and their company Squad Music, and if this were to
14 be kept here, I think, your Honor, it is guaranteeing a
15 multiplicity of suits. The co-owner, Mr. Quenneville, only has
16 5 percent of the composition. Mr. Tesfaye has 28 percent. Two
17 thirds of the copyright is owned by people who aren't in the
18 case anymore. Plaintiff will do one of two things. If
19 plaintiff were to prevail here, he's got to go after the other
20 majority owners of the composition, and if he loses here, he's
21 got to go after the Squad Music people, who received the
22 settlement payment and as to which he has rights to share in
23 that settlement payment. The Court would automatically, in
24 terms of judicial efficiency -- which I understand is the
25 significant concern -- they've carved down the case to try and

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1 make it look like it belongs here, but they're punching it on
2 over \$5 million of claims that they dismissed without
3 prejudice, just for the purpose of this hearing, that they can
4 reassert at any point against Daft Punk, which has agreed to be
5 subjected to the jurisdiction in California, against
6 Mr. Uschold and Mr. Dangerfield, who are residents of
7 California and co-authors of the composition and who she sued,
8 until she dismissed the claim without prejudice, for \$5 million
9 in breach of contract and breach of fiduciary duty. We've
10 still got two California -- or one Canadian and one Californian
11 co-authors of "Starboy" who plaintiff hasn't bothered to serve.
12 I mean, these are significant reasons why, if this Court were
13 to keep the case, you're going to have multiple pieces of
14 litigation. But on the other hand, if your Honor transfers it
15 to California, then you've got all the defendants and all the
16 claims and it gets resolved in a single case.

17 THE COURT: All right. Thank you very much.

18 Let me hear finally from plaintiff's counsel.

19 MR. ANDERSON: Thank you, your Honor.

20 MR. BURROUGHS: First, on the issue of the Def Jam
21 case, the record -- and we provided your Honor with an order as
22 an exhibit to our opposition -- makes clear that UMG took a
23 position that's diametrically opposed to what it's now taking
24 in this case. It said that despite the fact that it has Santa
25 Monica --

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1 THE COURT: That only shows they're represented by
2 counsel.

3 MR. BURROUGHS: Right. But actually different counsel
4 in that case than in this case, which is interesting.

5 But beyond that, the litigation history also bears
6 that out. We did point to 260 different cases in which UMG
7 litigated in New York, and in eight of those cases, UMG is the
8 plaintiff. So they chose to bring a lawsuit in New York. So
9 for them to now argue that it's difficult for them to litigate
10 here, inconvenient, it doesn't pass the straight face test.

11 Now we note in our opposition that it doesn't appear
12 that UMG has ever, before this motion, tried to move a case out
13 of New York -- or from New York to California. This is the
14 first time that we could ever find that happening. The reply
15 doesn't cite anything to the contrary. Every contract that UMG
16 has with Tesfaye and with everyone else in this case has a New
17 York forum selection clause. So on the issue of convenience,
18 while there may be factors that support both venues, we have to
19 remember, on the venue test, the moving party bears the burden,
20 unlike jurisdiction, and as we cite, the *Capitol Records* case
21 says that even if it may tilt slightly in favor of another
22 forum, you maintain plaintiff's choice of forum, even if she
23 doesn't reside in that forum, and especially if the infringing
24 product is still being exploited in New York. And that's what
25 we have here.

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1 On the issue -- going back real briefly to mastering,
2 I know we've talked a lot about that, but we're talking about
3 an infringing product, this song and the album upon which it
4 resides. That infringing product was finished here in New York
5 at Conway Studios by a New York producer, who would testify to
6 his mastering of the final product. He would be beyond the
7 subpoena power of California. We could not compel him to
8 appear at trial through a trial subpoena.

9 Finally, on the Daft Punk issue and all these other
10 claims, we attempted to serve some of these other individuals.
11 They evaded service. It doesn't appear they have assets to
12 support a judgment. I'm speaking now of the Squad defendants.
13 So they were dismissed. The remaining defendants, the Daft
14 Punk defendants, we have been in communication with them.
15 They've indicated they preferred to litigate the case in
16 France. In fact, they believe the case should be litigated in
17 France. Now I haven't pushed back against that, but we have
18 had that discussion.

19 So the real dispute here is between our client
20 Ms. Mohamed and Mr. Tesfaye, and while the settlement agreement
21 that Mr. Tesfaye sent through his New York lawyer at the New
22 York law office to our client, it's probably excludable at
23 trial and there are 408s and its relevance may be limited, but
24 it did initially include a New York forum selection clause.
25 That was later negotiated out of the agreement, but initially,

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1 when Tesfaye's New York attorneys sent that agreement, it
2 included that New York forum selection clause.

3 And the very fact that it was Mr. Tesfaye and not one
4 of these other defendants that sought to resolve the case, that
5 was a signature to that agreement, even though it wasn't
6 eventually executed, also indicates that Mr. Tesfaye who's the
7 primary infringer in this action, and as indicated in the
8 papers, he now lives in New York. He has a long-term
9 relationship with New York. He feels at home here. For him to
10 claim it's inconvenient, again, there's no basis to that.
11 There's no evidence in the record to support that. So we feel
12 that the case is --

13 THE COURT: You said something before that I think I'm
14 not sure the case law supports. While normally the plaintiff's
15 choice of forum is given heavy weight in a transfer motion,
16 where the plaintiff is not herself a resident of the judicial
17 district where the case is brought, I think the case law is
18 that it is given less weight.

19 MR. BURROUGHS: That's correct, your Honor.
20 However -- and we cite to a number of cases for this. *Kiss My*
21 *Face Corp.*, *It's a 10, Inc.*, and *Habroud*. And what those cases
22 all stand for is the idea that even if a plaintiff does not
23 live in that forum, her selection of that forum should still be
24 deferred to unless the factors balance significantly against
25 her. And one thing that the Court should consider in looking

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1 at those factors is whether or not the infringing product is
2 still being marketed and sold in New York. And that's the case
3 here.

4 And the final point on that is, even if the plaintiff
5 doesn't live in the forum, if the acts that gave rise to this
6 action occurred in California, not New York, that's not
7 dispositive. You look at whether or not the infringement --
8 because remember, infringement is a tort, and that tort takes
9 place at the point of sale. Right now the record reflects only
10 152,000 sales of "Starboy" in New York. And --

11 THE COURT: All right. I'm going to cut you off with
12 my apologies, not because you aren't saying useful things, as
13 was your adversary, but we really have to get on to the next
14 matter.

15 I previously told you that I would give you a
16 bottom-line order ruling by December 31st. This is a colorable
17 motion. I'm not sure where I'm coming out, so I'm going to
18 give myself a few extra days. So I will get you a bottom-line
19 ruling by January 4. That still is before the first discovery
20 start date, filing your request for documents on January 10.
21 So it will still be sufficient one way or the other.

22 All right. So thank you very much. And I will take
23 the matter *sub judice*.

24 MR. BURROUGHS: Thank you, your Honor.

25 MR. ANDERSON: Thank you, your Honor.

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